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IN THE

Supreme Court of the United States

October Term, 1970.

No. 6217.

EDWIN JOSEPH GOULD,

Petitioner,

against

JOHN L. ZELKIN, as Warden of Greenhaven Prison, Stormville, New York,

Respondent.

Brief and Appendix for Respondent in Opposition to Petition for a Writ of Certiorari.

JEROME S. COHEN,
Acting District Attorney, Orange County, New York, Attorney for Respondent,
County Government Center,
Goshen, N. Y. 10924

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Assistant District Attorney,
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EDWIN JOSEPH GOULD,

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JOHN L. ZELKEN, As Warden of Greenhaven Prison, Stormville, New York,

Respondent.

No. 6217

Brief for Respondent in Opposition to Petition for a Writ of Certiorari.

Opinions Below.

The decision of the Supreme Court Appellate Division, Second Department, State of New York, affirming the judgment of conviction is found at 29 A. D. 2d 668, 34 A. D. 2d 785, and that of the New York Court of Appeals, unreported, denying Gould permission to appeal, is found at petitioners "App. 5."

Jurisdiction.

Petitioner seeks to invoke the jurisdiction of this court under 28 U. S. C. Section 1254 (1).

Question Presented.

Within the intendment of *Pate v. Robinson,* 383 U. S. 375, was the defendant deprived of due process and a fair trial insofar as no hearing as to his sanity was held during the course of his trial?

Statement of the Case.

Petitioner was indicted under indictment #3732 on September 4, 1962, for the crimes of Robbery in the First Degree, Grand Larceny in the First Degree and Assault in the Second Degree. On December 12, 1962, and prior to trial, he was committed to Matteawan State Hospital for the Criminally Insane, examined, and found unable to understand the charges against him and unable to make a defense. However, by August, 1963, the Superintendent of Matteawan had certified petitioner as sane. After trial, upon a jury verdict, petitioner was found guilty as charged and sentenced as a fourth felony offender. On appeal from the judgment of conviction and pursuant to order of the Supreme Court, Appellate Division, First Department, *People v. Gould,* 29 A. D. 2d 668, a hearing as to defendant's sanity at the time of said trial was held before County Court Judge Edward M. O'Gorman. As stated in a memorandum opinion dated September 27, 1968, annexed hereto as Respondent's Appendix "A," it was the finding of Judge O'Gorman at the conclusion of said hearing, that "The available credible evidence indicates that the defendant was in fact of sufficient understanding to know the nature of the charges pending against him and to participate adequately with his counsel in his own defense on his trial in County Court during November, 1963 * * *. The trial record further convinces the Court that the defendant was in fact capable of understanding the nature of

the charges then pending against him and of participating with counsel in making his defense thereto with his trial counsel, and I so find." Upon such finding, the Appellate Division, having held its decision in abeyance, then affirmed the judgment of conviction, *People v. Gould,* 34 A. D. 2d 785. Subsequently, the New York Court of Appeals denied petitioner permission to appeal on the ground that no question of law was presented. At present, petitioner has made application to this court for a writ of certiorari.

Reasons Why Certiorari Should be Denied.

Petitioner contends that he was deprived of due process and a fair trial in that no hearing as to his sanity was held during the course of his trial, that such failure was unconstitutional and in conflict with this court's decision in *Pate v. Robinson,* 383 U. S. 375, 15 L. Ed. 2d 815, 86 S. Ct. 836.

Pate v. Robinson, decided March 7, 1966, is not retroactive, and therefore has no application to the judgment of conviction rendered against this defendant on March 4, 1964. See *People v. Hudson,* 19 N. Y. 2d 137, 225 N. E. 2d 193, U. S., cert. den. in 398 U. S. 944, and *People v. Gonzalez,* 20 N. Y. 2d 289, 293-294, 229 N. E. 2d 220, U. S., cert. den. in 390 U. S. 971.

In addition, no statute similar to that in *Pate v. Robinson* is involved. The Illinois procedure, Ill. Rev. Stat., c. 38, Section 104-2 (1963), necessitated the impaneling of a jury and the conducting of a sanity hearing on a judge's own motion where the evidence raises a "bona fide doubt" as to a defendant's competence to stand trial. The court in *Pate v. Robinson* was plainly shocked that the trial court, considering the evidence presented, had not had such "bona fide doubt." Therein, no less

than four defense witnesses expressed the opinion that Robinson was insane. The uncontradicted testimony as to Robinson's prior history of pronounced irrational conduct included the slaying of his infant son, an attempted suicide, efforts to burn his wife's clothing and other acts of violence. The Supreme Court, in *Pate v. Robinson*, effectively declared that in view of such evidence to read the Illinois statute as the Illinois trial court had was so clearly unreasonable as to have effectively deprived Robinson of his constitutional right to a fair trial.

Furthermore, as was true in *People v. Hudson* and *People v. Gonzalez, supra,* there was herein present medical proof relative to conditions at the initiation of the trial and observations of witnesses who could describe defendant's conduct, both of which made possible a subsequent plenary inquiry into the defendant's sanity at the time of trial. In direct contrast is the *Pate v. Robinson* case. A new trial was therein mandated since "expert witnesses would have to testify solely from information contained in the printed record. That Robinson's hearing would be held six years after the fact aggravates these difficulties." *Pate v. Robinson, supra,* page 387. Without belaboring the point, the special circumstances of *Pate v. Robinson* were recognized by this court in the *Hudson* and *Gonzalez* cases and certiorari consequently denied therein. The case at bar is likewise to be distinguished.

The sanity issue under the New York practice is determinable by a judge (see McKinney's Code Crim. Pro. Sects. 662-a, 662-c) upon a hearing. Apart from its non-retroactivity, the decision in *Pate v. Robinson* has not rendered the New York practice unconstitutional. As with *People v. Hudson, supra,* the people concede that, where no sanity hearing whatsoever has been held,

under *Pate v. Robinson* there must be a remand to allow a sanity inquiry to be held in a proper case. However, it is to be remembered that this defendant, prior to commencement of his trial and after very extensive scrutiny at the Matteawan State Hospital, had been certified as sane by the Superintendent thereat. In addition, the special trial facts of the *Pate v. Robinson* case are clearly not resembled herein. The trial court herein was thus not proceeding *in vacuo* on the sanity issue, and the absence of any indicia of insanity at the trial lent further support to the trial court's decision not to again have the issue explored. The evidence certainly did not raise a "bona fide doubt" as to defendant's competence to stand trial.

It is therefore submitted that the availability of medical proof at the initiation of trial, the certification of sanity by the Superintendent of Matteawan, the obviously balanced conduct of the defendant throughout the trial and the determination upon the hearing before Judge Edward M. O'Gorman subsequent to the trial, preserved for Edwin Joseph Gould the safeguards of a concurrent determination.

This application for a writ of certiorari should be denied.

CONCLUSION.

The petition for a Writ of Certiorari should be denied.

Dated: Goshen, New York,
March 22, 1971.

Respectfully submitted,

JEROME S. COHEN,
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New York,

Attorney for Respondent,
County Government Center,
Goshen, N. Y. 10924

LAWRENCE X. KENNEDY,
Assistant District Attorney,
Of Counsel.

APPENDIX A.

STATE OF NEW YORK, COUNTY COURT,

ORANGE COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK,

against

EDWIN JOSEPH GOULD,

Defendant.

Index #892/62

Indictment #3732

Hon. Angelo J. Ingrassia, District Attorney of Orange County, for the People.

Charles Beck, Esq., Newburgh, for the defendant.

O'GORMAN, J.:

The defendant, on the 19th day of November, 1963, was found guilty of the crimes of Robbery in the 1st Degree, Grand Larceny in the 1st Degree, and Assault in the 2nd Degree, and was thereafter sentenced on March 4, 1964 as a fourth felony offender. Since that date the defendant has made numerous motions and has taken numerous proceedings in this court and elsewhere attacking the validity of his sentence and the validity of his various convictions, which more fully appear in the various records of the proceedings to date.

There is an appeal from the November, 1963 conviction being considered by the Appellate Division, Second Department. That court has, by order dated January 15, 1968, returned the case to this court for the purpose of holding a hearing to inquire into defendant's sanity at the time of his trial.

After a considerable delay, which has been occasioned by efforts to obtain counsel for the defendant and to process various proceedings instituted by them as preliminaries to the conduct of the hearing, the matter finally has been heard and, at the request of the defendant, determination of the matter was delayed until the September term of this court.

The available credible evidence indicates that the defendant was in fact of sufficient understanding to know the nature of the charges pending against him and to participate adequately with his counsel in his own defense on his trial in County Court during November, 1963.

The testimony of the attorney who represented the defendant at his trial amounted, at best, to an opinion that at the present time it is counsel's recollection that it was his opinion at the time of the trial that the defendant did not understand the charges and was not of sufficient understanding to assist in his defense. The record is devoid of any motions made by counsel to this effect, and counsel indicates that he based his opinion on the fact that defendant had a prior history of commitment to mental institutions, and on impressions that he got from unspecified conversations.

The defendant's testimony that he does not recall anything of his former trial is not credited by the court, and in any event would not be probative of defendant's inability to comprehend the charges pending against him or of participating in his defense at the time of the

trial. No qualified experts were produced on behalf of the defendant to controvert the findings of the examining psychiatrist at Matteawan that the defendant was in fact capable of standing trial.

The trial record further convinces the court that the defendant was in fact capable of understanding the nature of the charges then pending against him and of participating with counsel in making his defense thereto with his trial counsel, and I so find. His attorney, on the present hearing, has indicated on cross examination that the defendant did in fact supply him with accurate information and otherwise participated normally in the proceedings.

Submit order and transmit the findings of the court to the Appellate Division in accordance with their direction.

Dated: September 27, 1968.

EDWARD M. O'GORMAN
J. C. C.